

## Essay: I Choose, You Decide: Structural Tools for Supreme Court Legitimation

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*Efforts to rein in partisanship (or the perception thereof) on the Supreme Court tend to focus on reforms to the selection, appointment, or tenure of Justices. I propose a different (and perhaps complementary) reform, which would not require constitutional amendment. I propose that the selection of a case for the Court’s discretionary appellate docket should be performed by a different group of judicial officers than those who hear and decide that case. The proposal leverages the insight of the “I Cut, You Choose” procedure for ensuring fair division—only here, it manifests as “I Choose, You Decide.” This proposal, rather than attempting to correct any supposed institutional deficiency that exacerbates the effects of partisanship, instead seeks to create a structure of checks and balances by pitting partisanship against partisanship.*

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## I. INTRODUCTION: AN INFLECTION POINT

The Senate's categorical refusal to consider any nomination by President Barack Obama to fill the Supreme Court vacancy opened by the death of Justice Antonin Scalia,<sup>1</sup> followed by the abolition of the filibuster for Supreme Court nominations<sup>2</sup> and the razor-thin confirmation vote on the nomination of then-Judge Brett Kavanaugh to that Court,<sup>3</sup> marks an inflection point in half a century of partisan mobilization around the staffing of America's super-legislature.<sup>4</sup> Then-Judge Kavanaugh's intemperate display and partisan diatribe at his high-profile confirmation hearing<sup>5</sup> brought partisan politics from the subtext of Supreme Court confirmation battles up to the surface for all to see.<sup>6</sup> With a long-wished-for five-vote ideological majority of the Court now secured by a minority political party<sup>7</sup> and sealed by the nominee's own partisan outburst at his confirmation hearing, the perceived legitimacy of the Supreme Court as a trusted arbiter of legal and constitutional disputes of national importance—which has been

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<sup>1</sup> Letter from Charles E. Grassley et al., Senate Judiciary Comm., to Mitch McConnell, Senate Majority Leader (Feb. 23, 2016), <https://perma.cc/YV5P-NHHT> (“[W]e wish to inform you of our intention to exercise our constitutional authority to withhold consent on any nominee to the Supreme Court submitted by this President to fill Justice Scalia’s vacancy.”).

<sup>2</sup> Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://perma.cc/ASS3-3G9U>.

<sup>3</sup> See 164 CONG. REC. S6,697 (daily ed. Oct. 5, 2018) (confirming the nomination by a vote of 50 to 48, with Senator Daines absent and Senator Murkowski withdrawing her previously cast “nay” vote).

<sup>4</sup> See generally Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

<sup>5</sup> *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), <https://perma.cc/MKE4-9MBL> (statement of Judge Brett Kavanaugh) (“This whole two-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election. Fear that has been unfairly stoked about my judicial record. Revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups.”); *Supreme Court Nominee Brett Kavanaugh Sexual Assault Hearing, Judge Kavanaugh Testimony*, C-SPAN (Sept. 27, 2018), <https://perma.cc/2PEF-CK7M>.

<sup>6</sup> In the interest of full disclosure: I am one of thousands of law professors who signed an open letter opining that this display was evidence that then-Judge Kavanaugh is unfit to serve in the office which he now holds; I believe Christine Blasey Ford, and I also opposed the nomination on other grounds, including but not limited to partisan grounds. *The Senate Should Not Confirm Kavanaugh. Signed, 2,400+ Law Professors.*, N.Y. TIMES (Oct. 3, 2018), <https://perma.cc/ECH9-YFAD>.

<sup>7</sup> The President who nominated Kavanaugh received millions fewer popular votes in the 2016 presidential election than his opponent, and the senators who voted to confirm Brett Kavanaugh’s nomination represented millions fewer citizens than the senators who voted against confirmation. Philip Bump, *Senators Representing Less than Half the U.S. Are About to Confirm a Nominee Opposed by Most Americans*, WASH. POST (Oct. 6, 2018), <https://perma.cc/9ZX4-LL4Y>.

slowly eroding for decades<sup>8</sup>—has been dealt another serious blow.

There are some who will welcome this development—who think that the Supreme Court’s perceived institutional legitimacy has always been a sham, and that the democratic deficits of judicial review far outweigh any redeeming value of the institution.<sup>9</sup> Others, however, will mourn the Court’s lost legitimacy, and some of them are looking for ways to salvage it.<sup>10</sup> This Essay adds a novel proposal that can be used as a structural principle to assist in that effort, whether alone or as a complement to other extant proposals. The proposal is simple: the selection of a case for the Supreme Court’s discretionary appellate docket should be performed by a different group of judicial officers than those who hear and decide that case.

## II. ARE PARTISAN COURTS A PROBLEM?

The past few years have put a spotlight on the political nature of courts—and particularly of the Supreme Court—in a way not seen since the heyday of American Legal Realism and the court-packing crisis of the New Deal era.<sup>11</sup> But this level of attention does not necessarily mean that judicial partisanship is a bad thing. The most plausible way to frame the partisanship of the Supreme Court in positive (and perhaps Burkean) terms is to view the Court as an institutional mechanism to tie social changes of constitutional magnitude to relatively long time-scales by means of life tenure. John Fabian Witt recently predicted (and critiqued) this type of structural argument:

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<sup>8</sup> See *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/Confidence-Institutions.aspx> (last visited Sept 1, 2019) [<https://perma.cc/89P4-UMQZ>].

<sup>9</sup> See, e.g., ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* xvii (2012) (“Because the Court functions much more like a political veto council than a court of law. . . the Supreme Court’s power to overturn the important decisions of other governmental officials should be seriously reevaluated. . . [W]e should be honest about how the council is structured and actually operates.”).

<sup>10</sup> See generally, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* (forthcoming 2019).

<sup>11</sup> Compare MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002) (examining the court-packing crisis); L.L. Fuller, *American Legal Realism*, 82 *U. PA. L. REV.* 429 (1933-1934) (summarizing the advance of American Legal Realism during the 1930s by one of its contemporaneous critics); with SEGALL, *supra* note 9 (identifying and critiquing episodes of political and ideological decisionmaking by the Supreme Court); Epps & Sitaraman, *supra* note 10 (“Recent events have seriously called into question the legitimacy of the Supreme Court. . . . From one perspective, this conflict is a welcome one. Americans have not been sufficiently critical of the Supreme Court’s role in our society over recent decades.”).

[The new justification (& critique) of the Court won't be about law. The new justification will be that [the Supreme] Court lets political coalitions extend their authority beyond their electoral successes. For good & for ill. That's all. [The question] is whether majorities will put up with it. I suspect not.<sup>12</sup>

This argument has two possible readings. The first, and more cynical, reading is that evanescent electoral majorities in the political branches may, through luck, skill, and strategic persistence, use the Court's power to harden their preferred policies into constitutional rules, making those policies more durable than any electoral majority can be expected to be. Call this the "Smash and Grab" argument. The second (and more favorable) reading is that the increasing but unaligned durations of official tenure held by Presidents, Senators, and Supreme Court Justices ensure that, for legal and social changes of constitutional magnitude to be made, the proponents of such changes will likely have to prevail consistently in electoral politics over a long enough period of time to build a Supreme Court majority, which may be a reliable indicator of democratic legitimacy. Call this the "Persistent Majorities" argument.

The Smash and Grab argument is anti-democratic in a way that seems exactly contrary to the most common contemporary justification for the judiciary's countermajoritarian tendencies—the protection of constitutional rights (and particularly the rights of minorities) against the passions of illiberal electoral majorities.<sup>13</sup> But I also have doubts about the Persistent Majorities argument, precisely because it depends on electoral victories in the most *anti-majoritarian* of our national electoral institutions: the Senate and the Electoral College. (This same doubt may inform Witt's question "whether majorities will put up with" Supreme Court authority framed in these terms—it seems to assume that the Court will inevitably be staffed by a popular minority.) In short, partisan alignment of the Supreme Court with an ideologically cohesive popular *minority* seems to me to be a real problem for anyone who believes that the law ought to have some democratic accountability.

Still, I remain sympathetic to the notion that the courts play an important role in protecting unpopular minorities—particularly those whose identity or membership is constructed by reference to immutable characteristics rather than ideological cohesion—from invidious discrimination at the hands of an inflamed majority. Therefore, in the absence of democratic reform of the Senate or the Electoral College, some

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<sup>12</sup> John Fabian Witt (@JohnFabianWitt), TWITTER (Sept. 28, 2018, 10:51 AM), <https://perma.cc/TR76-DDPV>.

<sup>13</sup> See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 107 (2002).

structural tool to blunt the partisan impulses of the Justices—and especially the effects of such impulses on the Court’s legitimacy—seems to be called for even in the absence of some fully-worked-out theory of the legitimacy of judicial review in general. In short, if partisanship is not a virtue to be operationalized in the structure of the federal judiciary, it is a vice that must be managed by that structure.

But if partisanship in the exercise of the judicial power is a problem, what is the solution? Either judges must become non-partisan—precisely the fantasy that the confirmation wars of the past half-century have shattered—or their partisanship must be somehow tamed, checked, or cabined—perhaps by partisanship itself. This latter option is particularly in keeping with American constitutional theory—the principle that “[a]mbition must be made to counteract ambition,” thereby “supplying, by opposite and rival interests, the defect of better motives[.]”<sup>14</sup> That principle suggests we need a structural understanding of the role of an admittedly partisan federal judiciary in the broader American constitutional framework, and of partisan Supreme Court Justices within a partisan federal judiciary.

### III. A NEW STRUCTURAL PROPOSAL

Tools to address judicial partisanship have been proposed in the past, and are enjoying another moment in the limelight in the wake of the Kavanaugh confirmation process. Most notable are term-limits proposals of the type that have been bandied about before,<sup>15</sup> and have been given renewed attention by a number of law professors organized under the “Fix the Court” banner.<sup>16</sup> Their most recent proposal, the “Regularization of Supreme Court Appointments Act,” would stagger Supreme Court appointments at regular two-year intervals and rotate Justices out of active service after eighteen years.<sup>17</sup> There have also been panel proposals that would have Supreme Court appeals heard by a (possibly random) subset of eligible Justices rather than the full bench.<sup>18</sup> One such proposal would staff such panels from an expanded Supreme Court based on the “I Cut, You Choose” procedure adapted from game theory: the parties would propose panels to one another in an iterated process, which would end when one party agrees to a panel

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<sup>14</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>15</sup> See generally Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006).

<sup>16</sup> See FIX THE COURT., <https://www.fixthecourt.com> (last visited July 27, 2019) [<https://perma.cc/7N43-MJJJ>].

<sup>17</sup> *Letter to Congress on the Regularization of Supreme Court Appointments Act of 2017*, FIX THE COURT. (June 29, 2017), <https://fixthecourt.com/2017/06/tlproposal/> [<https://perma.cc/UCB2-D56Q>].

<sup>18</sup> See generally Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439 (2009).

assembled by the other party.<sup>19</sup>

While each of these proposals implicitly recognizes partisanship in the judiciary as a vice rather than a virtue, they all seek merely to limit the *durability* or *consequences* of a partisan tilt in the Supreme Court—to accept partisanship as a biasing influence but to limit its duration (via term limits) or effects (by letting litigants choose their Justices). None of these proposals would attempt to check judicial partisanship *with* judicial partisanship. My proposal does. It draws on the same game-theoretic insight as the iterated-panel-selection proposal (while implementing that insight more directly), and could well be layered over any of these or other proposals. I propose that the selection of a case for the Court’s discretionary appellate docket should be performed by a different group of judicial officers than those who hear and decide that case.

At its most basic, the proposal would: (a) commit the question of selecting and certifying appeals for Supreme Court review to one group of judicial officers, and (b) commit the hearing and disposition of appeals so certified to a *different* group of judicial officers. Call the first group the “Certiorari Bench” and the second group the “Merits Bench.”

The Certiorari Bench and the Merits Bench could be divisions of the Supreme Court delineated by rule or statute, or the Merits Bench could simply be the Supreme Court while the Certiorari Bench could be a separate judicial body created or designated by Congress to manage the discretionary appellate docket of the Supreme Court. Indeed, the latter model has some analogues in other judicial systems—and even in the history of the federal judiciary. For example, New York affords the Appellate Division of the Supreme Court (the state’s intermediate appellate court) authority to certify appeals to the New York Court of Appeals (the state’s court of last resort).<sup>20</sup> And a similar delegation of authority to the judges of the Federal Circuit Courts of Appeal was among the reforms successfully recommended to Congress by Supreme Court Justices prior to the current era of the certiorari docket.<sup>21</sup> Thus, from 1891 to 1925, the Supreme Court’s appellate docket was in fact significantly determined by discretionary *Circuit Court* certification.<sup>22</sup>

The key insight of the “I Cut, You Choose” procedure is that the cutter has an incentive to limit any unfair partiality in the division of a resource

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<sup>19</sup> See generally Ian Bartrum et al., *Justice as Fair Division*, 45 PEPP. L. REV. 531 (2018).

<sup>20</sup> N.Y. C.P.L.R. § 5602 (McKinney 2012) (“An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals . . .”).

<sup>21</sup> See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1651–52 (2000).

<sup>22</sup> *Id.* at 1650–57; Judiciary Act of 1891 (“Evarts Act”), ch. 517, § 6, 26 Stat. 826, 828 (1891).

between rivals, because any such partiality will likely redound to the benefit of the chooser rather than that of the cutter. By structuring the Supreme Court's work using an analogous "I Choose, You Decide" strategy, this proposal has the potential—if implemented effectively—to prevent the most polarized partisan issues from being constitutionalized through Supreme Court intervention. In an era when Supreme Court Justices are transparently being nominated and confirmed based on their perceived willingness (or unwillingness) to enshrine partisan positions on particular issues of policy in constitutional law, the power to *both* decide when to issue a ruling on such an issue of law *and* to then issue that ruling is substantial, and tends toward the Smash and Grab model of Supreme Court authority. Rather than pretend that such partisanship is not in play, the "I Choose, You Decide" proposal seeks to check and balance such partisanship while maintaining the Supreme Court's role as an authority on questions of federal and constitutional law.

The key feature of this proposal is that it uses structural design to give partisan actors incentives toward moderation in constitutional innovation, reaction, or countermajoritarian policymaking through the courts. So long as the partisan policy preferences of the two benches are not strictly aligned (an issue I address further below), the Certiorari Bench has an incentive to select for adjudication only those cases on which it does not strongly object to the partisan preferences of the Merits Bench majority, and the Merits Bench majority thus would have no *opportunity* to enshrine its most polarizing policy preferences in constitutional law. Such polarizing questions would then, of necessity, be left to democratic mobilization (or, potentially, regional variation—a possibility also discussed below). This leaves unresolved the deep democratic deficiencies of the American constitutional system—most notably the composition of the Senate and the Electoral College—but at least takes one powerful means of entrenching countermajoritarian policies off the table.

Another nice feature of this proposal is that it does not require the heavy lift of constitutional amendment. The appellate jurisdiction of the Supreme Court is completely within Congress's control under Article III of the Constitution, which provides that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."<sup>23</sup> The Supreme Court itself has long interpreted its appellate jurisdiction as being wholly within Congress's control under this constitutional provision.<sup>24</sup> Indeed, it was Congress that

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<sup>23</sup> U.S. CONST. art. III, § 2.

<sup>24</sup> *See, e.g.*, *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 378 (1893) ("This Court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress.").

once provided for discretionary *Circuit Court* certification of cases for Supreme Court appellate review in the Evarts Act,<sup>25</sup> and it was Congress that created the current certiorari-based regime by passing the so-called “Judges’ Bill” in 1925,<sup>26</sup> at then-Chief Justice Taft’s persistent request.<sup>27</sup> The “I Choose, You Decide” proposal thus avoids the constitutional questions that attend many other reform proposals, particularly those that might be seen as in derogation of a constitutional principle of life tenure for federal judges.<sup>28</sup>

#### IV. IMPLEMENTING “I CHOOSE, YOU DECIDE”

For my proposal to be effective as a structural check on partisanship in the Supreme Court, the two groups of judicial officers it calls for must not be aligned in their partisanship. There are any number of ways of assuring—or at least raising the probability—of such partisan misalignment between the Certiorari Bench and the Merits Bench, though there are obstacles.

One approach to avoiding partisan alignment across the two Benches might seek to regulate the appointments process. For example, some procedure might hypothetically be devised for identifying the partisan adversaries of a nominating president in Congress and then conditioning the appointment of a Justice to the Merits Bench on giving those congressional adversaries the power to identify candidates for appointment to the Certiorari Bench (or vice versa).<sup>29</sup> But such proposals might founder on either constitutional limits regarding the prerogatives of the president and the Senate over judicial appointments or practical difficulties in binding senate majorities in advance on the exercise of their advice-and-consent powers. Moreover, it is not clear that service on the Certiorari Bench would be attractive to highly qualified judges and lawyers without the promise of someday serving on the Merits Bench.

Another possible mechanism would be to revert to the pre-1925 practice of giving Court of Appeals judges the responsibility to certify cases from their own appellate dockets for Supreme Court review—with a concomitant contraction in the authority of the Supreme Court to certify appeals by writ of certiorari. In this model, the Courts of Appeals would collectively serve as the Certiorari Bench. But the multiplicity of the Circuit Courts of Appeals makes this solution problematic. Because we can expect

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<sup>25</sup> See *supra* notes 21–22 and accompanying text.

<sup>26</sup> Act of Feb. 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

<sup>27</sup> Hartnett, *supra* note 21, at 1660–1704.

<sup>28</sup> See, e.g., Calabresi & Lindgren, *supra* note 15, at 859 (“Given that the Appointments Clause plainly contemplates a separate office of judge of the Supreme Court, it is hard to see how that office could constitutionally be filled for only eighteen years and not for life.”).

<sup>29</sup> Cf. Epps & Sitaraman, *supra* note 10, at 27–36 (proposing a “balanced bench” of Supreme Court justices selected on the basis of partisanship).



the partisan alignment of at least some Circuit Courts of Appeals to coincide with the partisan alignment of the Supreme Court at any given time, giving the Courts of Appeals the power to select cases for Supreme Court action might simply exacerbate partisan entrenchment in the Smash and Grab mold. Circuits that diverge from the partisan tilt of the Supreme Court would tend away from certifying appeals, while Circuits that align with the partisan tilt of the Supreme Court would be eager to certify appeals. Again, partisan alignment between the Merits Bench and the Certiorari Bench is a distinct possibility, and could be expected to lead to partisan selection of cases to be decided along partisan lines.

One particularly elegant alternative solution that avoids all of these pitfalls would be to retain authority to certify appeals in a unitary Supreme Court divided into a Certiorari Bench and a Merits Bench,<sup>30</sup> with service on each Bench to be based on length of tenure. This proposal could be integrated into a proposal for fixed terms of active service for Supreme Court Justices appointed at regular two-year intervals,<sup>31</sup> or any other term-limits proposal, though it does not require term limits in order to be effective. In one possible example of such a system, the first several years of a Justice's tenure could be served on the Certiorari Bench, and the remainder could be served on the Merits Bench.<sup>32</sup>

Moreover, if the Merits Bench were to have an even number of justices—as Eric Segall has notably recommended<sup>33</sup>—it would be fairly easy to design the tenure of the Justices in such a way as to make it exceedingly unlikely for multiple presidents of any particular *party* to dominate both the Certiorari Bench and the Merits Bench at the same time, regardless of the presence or absence of Senate majorities for confirmation. For example, a

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<sup>30</sup> Treating the benches as a single court staffed by the same body of judges, rather than two separate courts staffed by different judges, also avoids the objections that ultimately defeated the 1972 Freund Committee proposal for a National Court of Appeals to serve as a filter on the Court's appellate docket. See generally PAUL A. FREUND ET AL., FEDERAL JUDICIAL CENTER REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter FREUND REPORT]. The constitutional objection—that the proposal would divide the appellate authority that the Constitution vests in “one supreme Court” across multiple courts—was largely subordinate to a number of prudential and normative objections to detracting from the Supreme Court's role as the sole legal authority of national scope—some of them raised by the Justices themselves. See Jack B. Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 UCLA L. REV. 580, 583–88 (1976) (summarizing reaction to the Freund Committee proposal).

<sup>31</sup> *Letter to Congress on the Regularization of Supreme Court Appointments Act of 2017*, *supra* note 17.

<sup>32</sup> This type of solution would require Justices transitioning from the Certiorari Bench to the Merits Bench to recuse (or be disqualified by rule or statute) from considering the merits of cases on which they had previously voted while on the Certiorari Bench.

<sup>33</sup> See generally Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).

Court whose Justices serve eighteen-year active terms—six years on a Certiorari Bench of three judges followed by twelve years on a Merits Bench of six judges—could not see both benches dominated by one party without that party controlling the White House for at least four out of five consecutive four-year terms, which has happened only twice since Reconstruction: the Democratic dominance under FDR and Truman, and the Republican dominance of the Nixon-Ford-Carter-Reagan-Bush years. Notably, even this danger could be substantially mitigated by extending the terms of Supreme Court Justices to twenty, twenty-two, or even twenty-four years and expanding the Court to, say, a Certiorari Bench of five or six Justices or a Merits Bench of eight Justices.

Additional tweaks are obviously available, and could further influence the likelihood that any particular partisan bloc could dominate both the Certiorari and Merits Benches at the same time. For example, Justices could alternate between the two Benches in two- or four- or six-year intervals, or Justices could be assigned to the Certiorari Bench after their active terms on the Merits Bench expire rather than the other way around. The latter option increases the risk of Justices resigning in favor of lucrative private sector employment rather than serving out a term on the Certiorari Bench. But that risk could be turned to an advantage, insofar as it offers a means to address the concerns regarding gerontocracy and retirement-timing gamesmanship that motivate many term limits proposals without inviting a constitutional debate over life tenure. For example, Justices could begin their terms with a fixed number of years on the Certiorari Bench, followed by a fixed number of years on the Merits Bench, and then return to the Certiorari Bench for the duration of their “good behaviour”<sup>34</sup>—or for as long as they decline to retire.

#### V. ADDRESSING POTENTIAL OBJECTIONS

Two substantial objections to the “I Choose, You Decide” proposal are apparent and must be addressed.<sup>35</sup> The first is that the ability of the Supreme Court to set its own agenda via certiorari is in fact an important aspect of its constitutional authority, and therefore ought not to be tampered with. The second is that the tendency toward Supreme Court inaction generated by the proposal may lead to inconsistencies in the interpretation of federal and constitutional law by the various Courts of Appeals, and that such

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<sup>34</sup> U.S. CONST. art. III, § 1.

<sup>35</sup> These concerns are unique to “I Choose, You Decide” and are thus addressed in this essay. I do not address the various challenges that have been raised to term-limits proposals or similar proposals that would distinguish between “active” service and non-active service of Justices, both because they have been thoroughly addressed by the advocates and critics of such proposals and because “I Choose, You Decide” does not inherently require term limits to be effective.

inconsistencies may persist for extremely long periods of time.

With regard to the first objection, several scholars and some Supreme Court Justices have argued that the power *not to decide* is in fact an important attribute of the Court's authority. In this view, discretion to decide some questions and leave other questions undecided is a key part of the Court's participation in the process of constitutional development, and its primary means of agenda-setting in that process. Descriptively, this is clearly an accurate portrayal of the modern Supreme Court, and has been documented as such by political scientists.<sup>36</sup> It is certainly a power that the Justices themselves believe is important.<sup>37</sup> But normatively, the idea that the Supreme Court's unelected judges *ought* to have the power to set an agenda for constitutional development is historically recent and theoretically problematic. It is, indeed, flatly inconsistent with the powers of the federal judiciary described in the Federalist Papers, and particularly with Alexander Hamilton's famous defense of the courts as the "least dangerous" branch of the federal government on grounds that they "can take no active resolution whatever" and "may truly be said to have neither FORCE nor WILL, but merely judgment[.]"<sup>38</sup>

The *absence* of discretion in selecting cases was a key feature of this early vision of the federal courts. Indeed, the "duty of giving judgment"<sup>39</sup> in whatever cases came in over the transom formed an important part of the founding justification for the power of judicial review: a court obligated to decide the case before it cannot shirk that duty by refusing to announce a result compelled by the Constitution.<sup>40</sup> As Edward Hartnett put it when synthesizing the arguments of scholars such as Alexander Bickel and John Harrison, removing the *duty* to take judicial action while retaining the *power* to do so undermines much of the justification for judicial review, converting

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<sup>36</sup> See generally H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

<sup>37</sup> See, e.g., William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 483–84 (1973) ("The screening function is an inseparable part of the whole responsibility . . . I expect that only a Justice of the Court can know how inseparably intertwined are all the Court's functions, and how arduous and long is the process of developing the sensitivity to constitutional adjudication that marks the role.").

<sup>38</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>39</sup> *Marbury v. Madison*, 5 U.S. 137, 171 (1803).

<sup>40</sup> *Id.* at 177–78 ("It is emphatically the province *and duty* of the judicial department to say what the law is. Those who apply the rule to particular cases must, *of necessity* expound and interpret that rule . . . . So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty.*" (emphasis added)); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 111–98 (2d ed. 1986).

it into “nothing more than a call for mixed government, with one branch—the judiciary—representing the interests and views of the ‘better’ class of society.”<sup>41</sup> Whether one feels this call should be answered in the affirmative is likely to determine whether one finds this first objection to the “I Choose, You Decide” proposal persuasive. Candidly, I find myself unmoved.

But even for defenders of the Supreme Court’s institutional authority to set the agenda for constitutional development, the “I Choose, You Decide” proposal need not be seen as a threat. All it does is ensure that this authority is not exercised in such a way as to give any individual Justice (or group of Justices) the authority to ask and answer the agenda-setting question at a single stroke. It need not deprive any individual Supreme Court Justice of the prerogative of *both* choosing which cases warrant Supreme Court review *and* deciding cases as a member of the federal court of last resort. All it need do is prevent any Justice from exercising both powers *in the same case*. To the extent that arguments in favor of the certiorari regime turn, like Justice Brennan’s argument on this point, on the unique responsibility of Supreme Court Justices to take a long view of the development of the law,<sup>42</sup> “I Choose, You Decide” does not threaten that responsibility; it merely divides elements of that responsibility up over the course of a Justice’s career.

The second objection is not so easily addressed. Partisan misalignment between the Certiorari Bench and the Merits Bench might well lead the former to deprive the latter of *any* opportunity to address legal or constitutional issues that admit to partisan polarization. This tendency would change the default resolution of such issues from *partisan* adjudication to *no* adjudication, at least at the Supreme Court level. Three consequences might be predicted to emerge. First, the authoritative nationwide settlement of polarizing issues of federal or constitutional law would likely freeze as of the date of adoption of “I Choose, You Decide”—the Court’s most recent authoritative statement on such issues as of that date is likely to become its last. Second, to the extent that the inferior federal courts create new rules of constitutional or federal law—or, as they have recently shown some appetite for doing when they perceive a partisan shift on the Supreme Court,<sup>43</sup> issue rulings contrary to Supreme Court precedent—those lower court rulings are unlikely to be reviewed (or, as the case may be, corrected) by the Merits Bench. Third, to the extent that a circuit split arises on a partisan issue, it is

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<sup>41</sup> Hartnett, *supra* note 21, at 1737.

<sup>42</sup> See *supra* note 37 and accompanying text.

<sup>43</sup> See, e.g., *June Med. Servs., LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *stayed pending application for cert.*, 139 S. Ct. 663 (2019). In some instances the lower courts have been emboldened to resist Supreme Court mandates within a single case upon a change in personnel. See, e.g., *Moore v. Texas*, 139 S. Ct. 666 (2019) (Roberts, C.J., concurring) (concurring in the Court’s affirmation, following a change in personnel, of its earlier ruling in the case, while noting that the Chief Justice had dissented from that earlier ruling).

likely to go unresolved, potentially indefinitely. These three problems would likely compound each other: lower courts unhappy with the Supreme Court's final word on a contentious issue might simply defy it, setting up a split with other lower courts that adhere to the Supreme Court's most recent precedent, and the resulting circuit split might harden into a persistent difference in the application of federal law based on geography for want of Supreme Court review. It is not difficult to imagine a situation in which the constitutionality of state and federal statutes on issues such as access to abortion, regulation of firearms, affirmative action programs, anti-discrimination laws, consumer protection measures, religious accommodations, and regulation of elections becomes subject to deep and persistent regional division.

These concerns are substantial. They go to the core of the Supreme Court's traditionally recognized responsibility to ensure the consistency and uniformity of federal law.<sup>44</sup> They raise the prospect that the Constitution might come to mean one thing in Boston and another in Biloxi, and that the economic, political, and social cohesion of the nation might fracture (more than it already has) as a result. Of course, federalism inherently presents similar opportunities for regional variation in legal rights and standards, and the Union yet endures. And the potential for a persistent stalemate that satisfies neither partisan bloc might lead Justices to engage in horse-trading across the divide between the two Benches to allow even partisan issues to come to resolution, as they appear to do now in contentious cases.<sup>45</sup> Even so, the changes to our civic framework that would attend a significant retreat of the Supreme Court from our legal and political lives are momentous enough that they call out for serious engagement.

There are some complementary reforms that might mitigate these concerns, but such reforms would undermine, at least in part, the counter-partisan promise of "I Choose, You Decide." Most obviously, the Certiorari Bench's discretion to deny the Merits Bench an opportunity to rule on

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<sup>44</sup> Though, for a critical review of this aspect of the Court's role, *see generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 73 (2008).

<sup>45</sup> JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 221–48 (2019) (describing negotiation and competition among the Justices for the vote of Chief Justice Roberts in *NFIB v. Sebelius*, culminating in a compromise whereby the Chief authored an opinion upholding the Affordable Care Act's individual health insurance mandate and Justices Kagan and Breyer joined in a portion of that opinion invalidating in part that statute's program for expanding Medicaid). This kind of horse-trading might be more difficult under "I Choose, You Decide" than it is within the decision of a single case, insofar as it requires trust on the part of the Justices who act first in either deciding a case or certifying a question that the other Justices will follow through on their side of the deal. But given the long-term, iterative relationship among the Justices, cultivation of such trust does not seem implausible. *See generally* ELINOR OSTROM & JAMES WALKER, *TRUST AND RECIPROCITY: INTERDISCIPLINARY LESSONS EXPERIMENTAL RESEARCH* (2003) (collecting papers on the theory of trust in reciprocal relationships and evidence therefore).

partisan issues might be cabined by creating certain classes of mandatory appeals. This approach was part of the Evarts Act, which governed the Supreme Court's appellate jurisdiction prior to 1925 and preserved appeals as of right directly to the Supreme Court in broad categories of cases including "capital or otherwise infamous" criminal cases, cases involving the construction of the federal constitution or the consistency of a statute with that constitution, or cases where the jurisdiction of the federal courts was at issue.<sup>46</sup> An analogous limitation on discretion was included in the 1972 Freund Committee proposal for a National Court of Appeals, which would have *required* that court to "retain[] for decision on the merits cases of genuine conflict between circuits (except those of special moment, which would be certified to the Supreme Court)."<sup>47</sup> Alternatively (or in addition), the void created by the Supreme Court's retreat might be filled with the work of specialist inferior courts, such as the explicitly specialist Court of Appeals for the Federal Circuit or the implicitly specialist Court of Appeals for the District of Columbia Circuit.

But both of these potential solutions create problems of their own. The enumeration of categories of mandatory appeals raises the question of how membership in such a category is to be determined (or, more to the point, who will have authority to determine it). This is particularly problematic for categories as vaguely defined as, for example, "cases of genuine conflict between circuits." Moreover, the creation of specialist Article III courts—which has generated some controversy where it has been attempted<sup>48</sup>—simply pushes the problem of partisanship down to those courts, with the

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<sup>46</sup> Judiciary Act of 1891 ("Evarts Act"), ch. 517, § 5, 26 Stat. 826, 827–28 (1891). The original House version of the Act had specifically *required* circuit courts to certify an appeal to the Supreme Court in diversity actions that presented a circuit split; this specific provision was stripped out in the Senate. *Compare id.* § 6 ("[T]he judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States . . . excerpting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.") with 21 CONG. REC. 3,375, 3,402 (1890) ("That the judgments and decrees of the circuit court, in all cases in which jurisdiction is acquired by the district court by citizenship of the parties only and in which no question arises under the Constitution, laws, or treaties of the United States, shall be final and conclusive, unless the circuit court, or two judges thereof, certify to the Supreme Court that the question involved is of such novelty, difficulty, or importance as to require a decision by the Supreme Court. But any question shall be so certified upon which there has been a different decision in another circuit, in the same manner in which questions were heretofore certified upon which the judges holding the circuit courts were divided in opinion, and the Supreme Court shall receive, hear, and determine all such questions so certified . . .").

<sup>47</sup> FREUND REPORT, *supra* note 30, at 47.

<sup>48</sup> See generally Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2013).

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added risk of capture by repeat players in the areas of specialization.<sup>49</sup> Ultimately, any effort to maintain the consistency and uniformity of federal law under an “I Choose, You Decide” system comes at the price of upsetting that system’s balance of partisanship against partisanship.

## VI. CONCLUSION: WHICH IS THE GREATER EVIL?

This dilemma requires us to measure up our tolerance for politics carried out through the courts and our commitment to uniformity in federal law, and to choose which matters most to us in the Supreme Court’s design. The alternative to polarizing partisan rulings from the Supreme Court is not a less partisan Court, it is a less active one. We can have a more robust Supreme Court, or a less partisan one, but we cannot have both.

Americans deeply disagree about the best principles upon which to build a just society, and about the application of our Constitution to our contemporary problems. That is not in itself a bad thing, but it does require us to find a way to live together in the face of such disagreement. We have lately become accustomed to asking the Supreme Court to tell us how to do so by choosing a winning side in our partisan debates, even while we reserve the privilege of denigrating the Court when it chooses our adversaries over us. If we could ever plausibly have believed that our deep differences would dissolve under the guidance of such Supreme Court opinions, we should by now have disabused ourselves of such a notion. By continuing to indulge the obvious fiction that the Supreme Court merely calls balls and strikes according to rules on which we all agree,<sup>50</sup> we will continue to find ourselves in the position of Shylock and Gratiano before the *incognita* Portia: obsequiously praising the learning and honor of our judges, but only when they rule in our favor.<sup>51</sup> If we no longer wish to indulge this charade, we must be willing to channel our disagreements into other civic institutions—and perhaps rejuvenate those institutions so they will be fit for purpose.

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<sup>49</sup> See generally J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543 (2018); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

<sup>50</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing on S. No. J-109-37 Before the S. Comm. On the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) (“I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

<sup>51</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.